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No. 124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

JOSEPH A. BASS, RAYMOND J. BASS, and ANITA RUTH BASS, individually, and as co-partners doing business under the name and style of Joseph A. Bass Company; PAUL STEENBERG CONSTRUCTION COMPANY, a corporation; and FLEISHER ENGINEERING AND CONSTRUCTION COMPANY, a corporation, *Petitioners*

v.

UNITED STATES OF AMERICA and KENNETH C. ROYALL, Secretary of the Army

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	5
Statement	6
Reasons for Granting the Writ	9
I. The Decision of the Court of Appeals for the Eighth Circuit Raises Questions of Federal Law of General and Continuing Importance	9
1. Petitioners could not by statutory appeal obtain judicial review of the questions here raised	9
2. The Congressional direction for finality will not bar judicial correction of administrative error	10
3. Failure to pursue statutory right of appeal to the Court of Appeals for the District of Columbia cannot make the issue here raised res judicata	11
II. Judicial Review by the District Court Is Essential in This Case to Correct Grave Errors of Law	13
1. Imposition of Burden of Proof on Petitioners and Application of Presumption of Correctness of the Secretary's Determination Violates the Statute and Deprives Petitioners of Due Process at the Administrative Level	13
2. Retroactive Application of the Renegotiation Act to Direct Contracts with the United States Violates the Due Process Clause of the Fifth Amendment	21
Conclusion	22

Page

Appendix A:

Opinion, United States Court of Appeals for the Eighth Circuit 1

Appendix B:

Statutes Involved 4

Appendix C:

Rules of the Tax Court of the United States..... 6

CITATIONS

Cases:

Aircraft & D. Equipment Corp. v. *Hirsch*, 331 U. S. 752 11
Athens Roller Mills v. *Commissioner*, 136 F. 2d 125 . 16
Avery v. *Commissioner*, 22 F. 2d 6 15
Brinkerhoff-Faris Trust and Savings Company v. *Hill*, 281 U. S. 673 11
Broadway v. *Alabama Dry Dock & Shipbuilding Co.*, 246 Ala. 201 14
Chicago & N. W. Ry. Co. v. *United States*, 104 U. S. 680 22
Choate v. *Trapp*, 224 U. S. 665 22
Collier & Wallis, Ltd. v. *Astor*, 9 Cal. 2d 202, 70 Pac. 2d 171 14
Co-op Publishing Co. v. *Comm'r*, 115 F. 2d 1017 15
Crude Oil Corp. v. *Comm'r*, 161 F. 2d 809 15
Estep v. *United States*, 327 U. S. 114 11
Estes v. *Denver & R. G. R. Co.*, 49 Colo. 378 14
Helvering v. *Cannon Valley Milling Co.*, 129 F. 2d 642 15
Hemphill Schools, Inc. v. *Commissioner*, 137 F. 2d 961 15
In re Dittrich, 215 Minn. 234, 9 N.W. 2d 510 14
Lawrence v. *Commissioner*, 143 F. 2d 456 15
Lichter v. *United States*, 334 U. S. 742....6, 11, 17, 21, 22
Luchenbach Steamship Co. v. *United States*, 272 U. S. 533 10
Lynch v. *United States*, 292 U. S. 571 22
Manning v. *State Compensation Commissioner*, 124 W. Va. 620 14

Page

Morrison v. *California*, 291 U. S. 82 16
Ohio Bell Tel. Co. v. *Comm'n*, 301 U. S. 292 19
Ohio ex rel. Bryant v. *Akron Metropolitan Park District for Summit County*, 281 U. S. 74 11
Perry v. *United States*, 294 U. S. 330 22
Ring Construction Co. v. *Secretary of War*, 8 T. C. 1070, aff'd. 178 F. 2d 714, cert. den. 339 U. S. 943 .....6, 12, 22
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 11
Sinking-Fund Cases, 99 U. S. 700 22
Stein Brothers Mfg. Co. v. *Secretary of War*, 7 T. C. 863 6
Stoll v. *Gottlieb*, 305 U. S. 165 11
U. S. Electrical Motors, Inc. v. *Jones*, 153 F. 2d 134 12
United States v. *Abilene & So. Ry.*, 265 U. S. 274 ... 19
United States v. *California Eastern Line, Inc.*, 348 U. S. 351 .....4, 8, 9, 10, 11, 12
United States v. *Central Pacific R.R. Co.*, 118 U. S. 235 22
United States v. *Fleischman*, 339 U. S. 349 16
United States v. *Northern Pac. Ry. Co.*, 256 U. S. 51 22
United States v. *Wunderlich*, 342 U. S. 98 21
Wiget v. *Becker*, 84 F. 2d 706 15
Williamsport Co. v. *United States*, 277 U. S. 551...15, 17

STATUTES:

5 U.S.C. sec. 1006(c) 20
26 U.S.C. sec. 1141 .....4, 5, 8, 9, 10, 12, 13

28 U.S.C.:
sec. 41(1) (1940 ed.) 5
sec. 1254(1) 2
sec. 1345 5

50 U.S.C. App. sec. 1191 .....5, 6, 13, 16, 20

Administrative Procedure Act, sec. 7(c) 20
Renegotiation Act of 1942, c. 247, 56 Stat. 245, April 28, 1942 .....2, 3, 5, 6, 7, 9, 13, 15, 21, 23
Sixth Supplemental National Defense Appropriation Act of 1942, Sec. 403, April 28, 1942, c. 247, 56 Stat. 245 .....5, 8, 9, 10, 15, 21

Page

Revenue Act of 1943, Act of February 25, 1944, c. 63, 58 Stat. 21, 78 ..... 5, 16, 21

MISCELLANEOUS:

90 *Cong. Rec.* 531 18
90 *Cong. Rec.* 532 18
90 *Cong. Rec.* 535 ..... 18, 19

Principles, Policy and Procedure to be Followed in Renegotiation, War Department Directive of August 10, 1942 16

Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations, March 31, 1943 16–17

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts,* 66 Harv. L. Rev. 1362 (1953) 11

Thayer, *Preliminary Treatise on Evidence* (1898) .. 13

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v.

UNITED STATES OF AMERICA and KENNETH C. ROYALL, Secretary of the Army

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 26, 1955.

OPINIONS BELOW

The opinion of the Tax Court (R. 61-72) is reported in 20 T.C. 428. The opinion of the District Court (R. 77) is reported in 129 F. Supp. 909. The opinion of the Court of Appeals (R. 97) is not yet officially reported, and is printed in Appendix A, *infra*, pp. 1-4.

JURISDICTION

The judgment of the United States Court of Appeals was entered April 26, 1955 (R. 103). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Where the United States of America enters into a valid contract at arms' length for the erection of simple cantonments for an agreed price of approximately five million dollars, and the following steps occur:

(a) The Government passes the Renegotiation Act, which by its terms applies retroactively to such contracts.

(b) Thereafter, the jobs are completed and accepted and fully paid for and no steps are taken to terminate the contracts although they could be terminated without liability for unearned profits or unfinished work.

(c) The Government acting though the Army, unilaterally, determines upon the amount claimed as "excessive profits" and demands a refund thereof.

(d) The contractor pursuant to statute petitions the Tax Court for redetermination of the amount of "excessive profits."

(e) After trying for about ten years without success to get a hearing in the Tax Court the contractors and the United States under Rule 30 of the Tax Court submit the case on a set of stipulated facts. The stipulation contains no facts from which the amount of "excessive profits" can be determined, and the case is submitted on briefs without testimony.

(f) The statute requires the Tax Court to determine certain matters in connection with its findings of the amount of "excessive profits", to-wit: (1) The efficiency of the contractor; (2) The reasonableness of the costs or profits; (3) The amount of capital employed; (4) The

extent of the risk assumed by the contractor; (5) The contractor's contribution to the war effort; (6) The character of the business; and other miscellaneous facts.

(g) On the stipulated record, and without any evidence before it concerning the matters it was required to pass upon in order to arrive at a redetermination of the amount of "excessive profits" the Tax Court makes this redetermination in the same amounts as those claimed by the Army. This was done, although as a *de novo* proceeding, and not one of review, the Tax Court was by the Renegotiation Act prohibited from using the Army unilateral determination as proof of "excessive profits."

(h) Upon the entry of the order of the Tax Court, amended pleadings were filed in the District Court in a suit earlier commenced under the statute by the United States for the purpose of collecting the amount fixed in the unilateral determination by the Army Secretary. The contractors, in their amended pleading, denied the finality of the Tax Court decision; they asserted their right to a trial in a constitutional court on every element of the claim set forth in the amended complaint; they alleged errors of law committed by the Tax Court; they asserted that the Court of Appeals of the District of Columbia had no jurisdiction to pass upon such matters; they asserted a violation of the due process clause of the Constitution of the United States; they asserted that the taking by the Government of the alleged "excessive profits" or any thereof, would be without compensation and in violation of their rights under the Fifth Amendment to the Constitution of the United States; they asserted that the retroactive application of the Renegotiation Act to the contracts in question was in violation of the Constitution of the United States; they asserted that the decision of the Tax Court was without any evidence to support it. On these pleadings and without any testimony or affidavits whatsoever the District Court granted the Government's motion for a summary judgment on the ground that the failure of

the contractors to appeal to the Court of Appeals from the Tax Court redetermination made that determination *res adjudicata.*

One: Whether in the light of the limited jurisdiction of the Court of Appeals of the District of Columbia established by this Court in *United States* v. *California Eastern Line, Inc.*, 348 U. S. 351, a Tax Court determination of the amount of excessive profits, based solely on a presumption of correctness of the Secretary's unilateral determination and imposition of burden of proof on the contractor, was barred from judicial review in the Court of Appeals of the District of Columbia under 26 U. S. C., sec. 1141 and, if so;

Whether, the decision of the Tax Court may, within the requirements of due process, be held *res judicata* so as to leave petitioners without right to obtain judicial review and correction in a constitutional court of such rulings of the Tax Court contrary to the provisions of the Renegotiation Act under which it purports to act.

Two: Whether in the light of the same limited jurisdiction of the Court of Appeals established by this Court in the *California Eastern Line* case, a determination of the amount of excessive profits made by the Tax Court, left petitioners without right, by appeal to said Court of Appeals under 26 U. S. C., sec. 1141, to obtain judicial review of decision of the Tax Court overruling petitioners' contentions as to unconstitutionality of the Renegotiation Act when applied retroactively to direct contracts with the United States, and if so;

Whether the decision of the Tax Court may, within the requirements of due process, be held *res judicata* so as to leave petitioners without right to obtain judicial review and correction in a constitutional court of such ruling of the Tax Court upholding the constitutionality of the Renegotiation Act as so applied.

STATUTES INVOLVED

The statutory provisions involved are 26 U.S.C. Sec. 1'41 and the Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, April 28, 1942, c. 247, 56 Stat. 245) as amended by the Revenue Act of 1943, Act of February 25, 1944, c. 63, 58 Stat. 21, 78 (50 U.S.C. App. Sec. 1191). They are printed in Appendix B, *infra*, pp. 4-6.

STATEMENT

This petition seeks review of an affirmance of a district court judgment entered on the Government's motion for Summary Judgment.

Complaint.—The United States and Kenneth C. Royall, Secretary of the Army, on October 22, 1947, filed their complaint in the United States District Court for Minnesota to recover on two orders of the Under-Secretary of War. The first cause of action alleged that under a unilateral order entered August 30, 1944, it had been determined that petitioners as co-venturers under two contracts for work at Camp Breckinridge had, between February 1942 and May 1943, realized profits excessive in the sum of $465,000 (R. 1-3, 6). For a second cause of action the complaint alleged that under another unilateral order entered the same day it had been determined that petitioners under contracts and subcontracts for work at Camp McCoy during the years 1943 and 1944 had realized excessive profits in the amount of $170,000 (R. 4-5, 8). Copies of the orders attached to the complaint as exhibits "A" and "B", respectively, each state that they are entered pursuant to section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 "as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable" (R. 6).

The jurisdiction of the District Court was invoked because the United States was a plaintiff (28 U.S.C. sec. 41(1) (1940 ed.); 28 U.S.C. sec. 1345) and because this was

a suit to collect an amount fixed by unilateral determination (50 U.S.C. App. sec. 1191(c)) (R. 1, 31).

Stipulation for Stay. — Pending decision by the Tax Court on their pending petition for redetermination, pursuant to stipulation made April 28, 1948 (R. 11) for the purpose of avoiding the running of interest, under protest and with full reservation of the right to recover the same, the petitioners paid the United States the sum of $288,623.62, being the principal amount due under the two unilateral orders after tax credit (R. 11) and deposited United States bonds in escrow to secure payment of interest to April 19, 1948, plus one year. The stipulation further provided for a stay of the action until final determination of the pending Tax Court proceeding (R. 13).

Tax Court Redetermination.—The Tax Court on May 22, 1953, promulgated its decision in petitioners' two redetermination proceedings (R. 61). It overruled petitioners' contentions as to constitutionality and burden of proof:

1. As to constitutionality the Tax Court held that all constitutional issues had been resolved in *Lichter* v. *United States*, 334 U. S. 742; *Ring Construction Co.* v. *Secretary of War*, 8 T.C. 1070, *aff'd* 178 F. 2d 714; *cert. den.* 339 U. S. 943; *Stein Brothers Mfg. Co.* v. *Secretary of War*, 7 T.C. 863 (R. 71-72):

(a) That the retroactive application of the Renegotiation Act to direct contracts entered into prior to passage of the original act of April 28, 1942, was not unconstitutional;

(b) That the remedy of Tax Court review with "unreviewable finality" does not fail to satisfy due process;

(c) That petitioners' rights under the contracts are not protected against renegotiation under the Fifth Amendment.

2. On the question whether petitioners' profits were excessive the Tax Court held that petitioners had the

burden of proving the Secretary's determination of excessive profits erroneous and had failed to offer any evidence on the point (R. 72). Accordingly, it ordered decisions for the respondent.

District Court proceedings. — After the Tax Court decision May 22, 1953 (R. 19, 61-72) petitioners on June 3, 1953, filed answer (R. 19-27). The United States filed a supplemental complaint asserting claim for interest at six per cent. (R. 31-34). Petitioners filed an amended answer (R. 40).

In pertinent substance, the amended answer, well-pleaded allegations of which are, on motion for summary judgment, taken as true, showed that all or substantially all of the profits earned by petitioners in connection with the renegotiated contracts set forth in the complaint were in relation to contracts entered into as the result of competitive bidding prior to the passage of the Renegotiation Act. The amended answer further alleged that the Tax Court decision was not binding because there was no right of appeal from the Tax Court, that the Tax Court had committed errors of law and that petitioners are entitled to a trial in a constitutional court of every element of the claim set forth in their claims and passed upon in the decision of the Tax Court (R. 41-42). The amended answer further alleged that the Tax Court erred (R. 45):

(a) In holding valid the Renegotiation Act retroactively applied;

(b) In applying the Act to simple cantonment erection contracts where the United States had the protection of competitive bidding;

(c) In affirming the unilateral determinations without proof of any of the grounds for making unilateral determinations;

(d) In ignoring the provisions of the Renegotiation Act for *de novo* proceedings in the Tax Court and in accept-

ing determinations made by representatives of the United States without any proof of reliability, accuracy or fairness of such unilateral determinations (R. 45).

Motion for Summary Judgment. — The United States filed motion for summary judgment (R. 49). Sustaining the motion, the District Court held (R. 77, 80):

(a) The constitutional questions here presented could have been reviewed on appeal to the Court of Appeals for the District of Columbia and, no appeal having been taken, are *res judicata;*

(b) Non-constitutional questions of fact and law decided by the Tax Court are final and not reviewable by virtue of section 403(e)(1) and that provision is constitutional.

Accordingly, the District Court entered summary judgment for the United States (R. 85).

Court of Appeals decision.—On appeal, the Court of Appeals for the Eighth Circuit affirmed the lower court. Because petitioners had not appealed to the Court of Appeals under 26 U.S.C. sec. 1141, it held *res judicata* against petitioners the issue whether or not they were entitled to a judicial determination of the constitutional issues that arose in the direct course of the Tax Court's determination of the amount of excessive profits. This despite the holding in *United States* v. *California Eastern Lines,* 348 U. S. 351, 354-355, that a sec. 1141 court of appeals review does not embrace or extend to determinations of the amount of excessive profits or the power to upset them. The Court of Appeals opinion on this point said (Appendix A, *infra,* pp. 3-4):

> Any questions as to jurisdiction of the Under Secretary of War to determine excessive profits or of the Tax Court to decide the issues presented to it and any questions as to the constitutionality of the Renegotiation Act or the proceedings taken under it were subject to review under 26 U. S. C. sec. 11.41. *United States* v. *California Eastern Line, Inc.,* supra [348 U. S. 351]. Since we are convinced that the decision of the Tax Court could not be reviewed, re-opened or collaterally

attacked in the District Court and was res judicata as to the validity and amount of the Government's claim, there is no justification for stating the various contentions of the defendants relating to the alleged invalidity of the claim.

Accordingly, the Court of Appeals affirmed the judgment of the District Court (R. 103).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals for the Eighth Circuit Raises Questions of Federal Law of General and Continuing Importance.

The Court of Appeals has decided a question of Federal Law which has not been, but should be settled by this Court: Since the Court of Appeals for the District of Columbia is precluded by the Renegotiation Act from reviewing Tax Court determinations of amount of "excess profits", if any, and since the Renegotiation Act provides that the decision of the Tax Court as to amounts of "excessive profits" may not be redetermined anywhere,[1] we have the important question of Federal Law as to whether such a provision excluding recourse to any Constitutional Court to review an unlawful and illegal determination of "excessive profits" by the Tax Court is valid under the Constitution or whether such a provision lacks the quality of due process.

1. *Petitioners could not by statutory appeal obtain judicial review of the questions here raised.*—Decisions of this court negative the right of appeal underlying the *res judicata* ruling of the courts below. The recent decision

[1] In *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351 this Court said (p. 355): "Thus it is easy to understand why Congress in § 403(e)(1) spelled out with meticulous clarity that Tax Court determinations of the amount of excessive profits, if any, should be final and non-reviewable. We agree that a § 1141 Court of Appeals review should not upset such determinations."

in *California Eastern Line, Inc.* v. *United States,* 348 U. S. 351, seems to us to mean that whenever the Tax Court makes a determination of the amount of "excessive profits" there can be no *appellate* review of that determination under Section 1141 of 26 U.S.C., regardless of errors of law, constitutional or otherwise, with which the Tax Court's determination of amount of excessive profits may be infected. The decision in *United States* v. *California Eastern Line, Inc.*, supra, should have been thus construed by the Eighth Circuit Court. Otherwise, no meaning is given to the express mandate of Section 403(e)(1) of the Act in its application to appellate review. If the finality language were not in the Act, the Court of Appeals would have the right to pass upon question of law, constitutional or otherwise, forming the basis for a determination of "excessive profits." It is also clear that if there were any substantial evidence to support the finding of the Tax Court, as to the amount, no court of appeals would redetermine the amount, except for errors of law. To construe this Court's opinion in *United States* v. *California Eastern Line, Inc.* to mean that the Court of Appeals could do anything on appeal, including the passing on questions of law and constitutional questions, and that it was excluded only from passing on questions of fact relating to the amount determined, seems to us an erroneous construction and one which robs the finality provision of any effect on appellate review under 26 U.S.C. sec. 1141.

2. *The Congressional direction for finality will not bar judicial correction of administrative error.* — Appellate review is, of course, a matter of grace and not of right. *Luckenbach Steamship Co.* v. *United States,* 272 U. S. 533, 536. On the other hand, there are limitations upon the constitutional power of Congress to grant finality to administrative decisions. We respectfully suggest that this Court has never sustained a finality provision like the one here involved and under circumstances such as obtain in this case, and that the Circuit Court of Appeals erred in

doing so. See *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District for Summit County*, 281 U. S. 74, 80; *St Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, *Estep* v. *United States*, 327 U. S. 114; *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673; Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. 1362 (1953).

In *Aircraft & D. Equipment Corp.* v. *Hirsch*, 331 U. S. 752, this Court said (p. 771): "We explicitly reserve decision upon the question of the finality of Tax Court decisions in these matters. * * * We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law or *whether it could do so* if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition" (Emphasis supplied). This reservation of decision was expressly reaffirmed in *Lichter* v. *United States*, 334 U. S. 742, 791. There has been no need for decision upon this point by this Court until this time.

It seems to be true that in the other appeals to the Circuit Court of Appeals for the District of Columbia in renegotiation matters, the Court acquired its jurisdiction by the consent of the parties. Neither party could thereafter attack the jurisdiction of the Court. See *Stoll* v. *Gottlieb*, 305 U. S. 165, 172, in which the Court said: "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined." This may have been what this Court had in mind, in the *California Eastern Line* case, when it approved the practice of the Court of Appeals in the renegotiation cases previously heard by it.

We respectfully suggest that this issue is properly presented and ought to be considered and decided here.

3. *Failure to pursue statutory right of appeal to the Court of Appeals for the District of Columbia cannot make*

the issue here raised res judicata. The courts below both point to the provisions of 26 U.S.C. 1141 authorizing appeal from decisions of the Tax Court to the Court of Appeals for the District of Columbia and assert that failure of the petitioners to invoke that appellate jurisdiction makes the issue res judicata. But manifestly, if the District of Columbia Court of Appeals, within that jurisdiction, could not and would not review the question, this basis for refusing judicial review must fail. It becomes particularly pertinent, therefore, that even before decision in the *California Eastern Line* case and in a prior case, *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714, 715 (U.S. App. D.C.), in which counsel for the contractor was the same as in the instant case, that Court said (p. 715):

> "The questions raised by the petitioner, other than the constitutionality of the statute when retroactively applied, are not open to review by this court. * * *
>
> With respect to this unequivocal language [of the statute] we said in *U. S. Electrical Motors, Inc.* v. *Jones,* 1946, 80 U. S. App. D.C. 329, 153 F. 2d 134, 136: '* * * We think * * * the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, * * *'.
>
> "We do not stop, therefore, to state or examine the faults found by the petitioner with the procedure and determination of the Tax Court * * *."

Thus, when the Tax Court entered its determination in the instant case, petitioner was presented with a judicially-created dilemma. If he pursued his right of statutory appeal to the Court of Appeals for the District of Columbia, he could there obtain no review of the legality of the Tax Court's rules as to presumptions and burden of proof, but possibly could obtain review of the question of constitutionality of the statute retroactively applied. On the other hand, it seems clear that if questions of legality of Tax Court rules as to burden of proof and evidence affect-

ing that court's determination of amount of excessive profits could not, as held by the District of Columbia Court of Appeals, be reviewed on appeal to the latter court, then failure to take the appeal could not raise the bar of res judicata if judicial review should be sought in the District Court of Minnesota. Furthermore, it would also appear anomalous at least to force the contractor to a bifurcated review proceeding: (a) statutory appeal under 26 U.S.C. 1141 to obtain review of the constitutional question as to retroactivity of the Act; and (b) non-statutory judicial review of other questions as to which the statute in form purports to make the administrative determination final.

II.

Judicial Review by the District Court Is Essential in This Case to Correct Grave Errors of Law.

1. Imposition of Burden of Proof on Petitioners and Application of Presumption of Correctness of the Secretary's Determination Violates the Statute and Deprives Petitioners of Due Process at the Administrative Level.

In initiating the proceeding for renegotiation the Secretary of War was obviously seeking to change the status quo, in effect to declare that money earned by and paid to the contractor, was money of the United States. Under general principles of English and American common law, the Secretary, thus seeking to change the status quo must show some factual basis for the ultimate facts that permit recovery. As claimant he bears the burden of overcoming the reluctance of the United States, as the preserver of individual rights, to force a change in the established division of property. Thayer, *Preliminary Treatise on Evidence,* p. 552 (1898).

Furthermore, section 403(e)(1) of the Renegotiation Act made applicable to petitioners' proceeding by section 403(e)(2) (50 U.S.C. App. sec. 1191(e)(1)(2)) provides:

> "A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination

> of the Board [Secretary] but shall be treated as a proceeding de novo."

The emphasis of the double command—"Shall not be * * * a proceeding to review" but "shall be * * * a proceeding *de novo*" cannot be ignored.

"Proceeding *de novo*" required that the amount of excessive profits, if any, be determined anew, without any presumption in favor of the Secretary's determination; the Tax Court replaces the Secretary as the administrative agency of first instance and his findings disappear with all presumptions that otherwise might have attached thereto. *Broadway* v. *Alabama Dry Dock & Shipbuilding Co.*, 246 Ala. 201, 206; *Manning* v. *State Compensation Commissioner*, 124 W. Va. 620, 624-625; *Estes* v. *Denver & R.G.R. Co.*, 49 Colo. 378, 385; *Collier & Wallis, Ltd.* v. *Astor*, 9 Cal. 2d 202, 70 Pac. 2d 171, 173. The ordinary rule requires the party having the affirmative of the issue to proceed with the evidence in the *de novo* proceeding. *In re Dittrich*, 215 Minn. 234, 238, 9 N. W. 2d 510.

Here the Tax Court held (R. 72):

> "Each party contends the other has the burden of proof and neither has offered evidence to establish the extent to which the profits were or were not excessive * * * The petitioners has taken the position that the respondent has the burden of proving that the amount of excessive profits determined by the orders in each case are not in error and it has offered no evidence to establish that the respondent's determinations were erroneous. As previously indicated, it is now well established that in a Tax Court proceeding for the redetermination of excessive profits, the petitioner has the burden of proving that the respondent's determination is erroneous."

It is significant that the Government did not avail itself of its right to introduce proof on the question of amount of excessive profits, if any. Its own prior decisions cited by the Tax Court in support of this holding (R. 72) rely

ultimately on its rule 32[2] stating that the burden is on the taxpayer in proceeding to redetermine deficiencies. The attempt by the Tax Court in its Rule 64[3] to make Rule 32 applicable and thus assimilate its review of tax deficiency determinations to its function under the Renegotiation Act overlooks the distinction imposed by Congress in vesting it with jurisdiction in renegotiation and clearly ignores the command that the "*de novo*" proceeding shall not be a "review" proceeding.

The rule as to "burden of proof" in the Tax Court appears really to be that of a presumption of law (*Crude Oil Corp.* v. *Comm'r.*, 161 F. 2d 809, 810 (10th Cir. 1947)) to make the determination of a deficiency prima facie correct. *Avery* v. *Commissioner*, 22 F. 2d 6 (5th Cir. 1927). When the opposing party produces evidence against it, as a presumption of law, it drops out of the case. *Co-op Publishing Co.* v. *Comm'r.*, 115 F. 2d 1017, 1021-1022 (9th Cir. 1940); *Lawrence* v. *Commissioner*, 143 F. 2d 456, 459 (9th Cir. 1944); *Wiget* v. *Becker*, 84 F. 2d 706, 707, 708 (8th Cir. 1936); *Hemphill Schools, Inc.* v. *Commissioner*, 137 F. 2d 961 (9th Cir. 1943).

But this rule as to burden of proof on the taxpayer or presumption of correctness in favor of the Commissioner thus applied in tax cases cannot rightly be applied in renegotiation matters:

(1) In tax cases, the Tax Court tries issues *de novo* but it does so purely as a reviewing agency and not as one of original action. *Williamsport Co.* v. *United States*, 277 U. S. 551, 564; *Helvering* v. *Cannon Valley Milling Co.*, 129 F. 2d 642. In contrast, section 403(e)(1), here controlling, specifically states that the proceeding in the Tax Court "shall *not* be treated as a proceeding to review the determination of the Board [i.e., War Contracts Board or (under sec. 403(e)(2)) Secretary].

(2) Presumptions are indulged only to supply facts based on comparative availability to the respective parties

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[2] Reprinted in Appendix C, *infra*, p. 6.

of material evidence. *Athens Roller Mills* v. *Commissioner*, 136 F. 2d 125, 128 (6th Cir. 1943). In the ordinary tax case, as a procedural device, it is not unreasonable to cast upon the taxpayer the burden of going forward with the evidence since he presumably is more familiar with the particular facts and has greater opportunity for knowledge; hence the comparative convenience test permits of application of the presumption. *Morrison* v. *California*, 291 U. S. 82, 90-91; *United States* v. *Fleischman*, 339 U. S. 349, 361. But under the Renegotiation Act, the determination of excessive profits is basically a process of comparison with data and results of operation of other contractors in regard to numerous factors: (i) efficiency of the contractor; (ii) reasonableness of costs and profits; (iii) amount and source of public and private capital; (iv) extent of risk assumed, including risk incident to reasonable pricing policies; (v) nature and extent of contribution to the war effort; (vi) character of business, including complexity of manufacturing technique, character and extent of sub-contracting, and rate of turnover; (vii) such other factors the consideration of which the public interest and fair and equitable dealing may require.[3]

That comparison with, and conclusions based on, data as to other companies were the major bases for all unilateral determinations of the Secretary is manifest from the War Department Directive of August 10, 1942 entitled "Principles, Policy and Procedure to be Followed in Renegotiation"[4] and the "Joint Statement by the War, Navy,

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[3] Section 403(a)(4)(A) added by the Revenue Act of 1943, Act February 25, 1944, sec. 701(b), 58 Stat. 78 (50 U.S.C. App. sec. 1191(a)(4)(A).

[4] The War Department Directive (reprinted in Hearings before the subcommittee of the Senate Committee on Finance on Pub. L. 528, 77th Cong., 2d sess., 16-28 (September 29, 1942) states (p. 21): "In determining what percentage would be fair, consideration should be given to the corresponding profits in prewar years for the particular company *and for the industry* * * *; to the corresponding percentage allowed to other companies* manufacturing similar war products or operating under similar conditions; * * *

and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations" issued March 31, 1943.[5] Both were cited by this Court as establishing administrative practice in *Lichter* v. *United States*, 334 U. S. 742, 773-774.

Obviously this data as to other companies upon which the Secretary's order was based could not be known or made known to petitioners. In this, the Act is similar to the provisions of the Revenue Act of 1918 for special assessment of war and excess profits taxes. See *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 559-561. It would, therefore, be manifestly unfair and unreasonable in this *de novo* proceeding, not by way of review, to thrust on the private contractor against whom an order is sought, the burden of going forward with the evidence to overcome a presumption. Plainly, he had neither the means nor the power, as did the United States, to obtain this information as to competitors' business. Indeed, each renegotiated contractor was always given repeated assurance that his financial and other data would never be disclosed to others. There is, therefore, no warrant in law, statutory or common, for the presumption and rule of evidence invoked by the Tax Court.

(3) Since no record was made in the proceeding before the Secretary, to cast on the contractor the burden of proof or of going forward makes review by the Tax Court illusory.

In the Senate, after the Senate Committee had reported

The margin of profit * * * should be adjusted * * * to reflect * * * factors of performance in respect of which the operations of the company *compare favorably or unfavorably with those of other companies.*" (Emphasis supplied.)

[5] "The Joint Statement" (reprinted in Hearings before the House Committee on Naval Affairs, 78th Cong., 1st sess., Vol. II, pp. 1025-1029 (1943) states (p. 1028): "In determining the margin of profit * * * consideration is given to the manner in which the contractor's operations *compare with those of other contractors* with respect to the applicable factors * * *." (Emphasis supplied.)

amendments that substituted the Court of Claims for the Tax Court, Senator Truman proposed an amendment that he thought guaranteed the contractor a day in court (90 Cong. Rec. 531). Pointing out that the Senate Finance Committee had substituted the Court of Claims for the Tax Court [changed back to Tax Court in conference], he said (p. 531):

> "* * * I propose that a contractor who claims to have been hurt by a unilateral determination of excessive profits shall be given an opportunity to show in court that the determination was based on facts which, in one or more material respects were clearly wrong, or that some error of law was invoked in the determination. If he cannot show that the determina- was wrong in any such respect, he should not be permitted to burden the court and the Government, or to stand in the way of other claimants who may have a real grievance."

Senator Clark answered (90 Cong. Rec. 532):

> "I think it is only fair to say that the only question in issue in this matter was whether, if we are to allow a court review, there should be a requirement that a record be kept by the renegotiation board, and that an appeal be allowed on that record or whether we should allow a trial de novo. Unless we have one or the other of those procedures, such a right of review as my colleague has suggested is merely a farce, a denial of any day in court, because they have nothing to go upon, while at the same time making the statement that we are giving them a day in court. * * * My colleague is suggesting, not a day in court, for if there is not a record and not a trial de novo, a man never gets a right to try his case. So far as I am concerned, I would rather strike out the whole provision for court review than have a *fake court review provision,* which I think this amendment would bring about."
>
> (p. 535) "It seems to me that the net result of the amendment proposed by my colleague—and I have great respect for his judgment and for the opinion of

> the Truman committee—would be simply *to throw the burden of proof on the appellant, without giving him any method whatever to sustain the burden of proof.* It seems to me that would be the situation as a practical legal matter." (Emphasis supplied)

The amendment was rejected (90 Cong. Rec. 535).

(4) To indulge the presumption of correctness as was done in the Tax Court involves the same vice that was held to invalidate the presumption invoked by the United States in *Interstate Commerce Commission* v. *Louisville & Nash. R.R.*, 227 U. S. 88. There, it was sought to support a commission order on the ground that the commission findings "must be presumed to have been supported" by extra-record information not formally proved. This Court held (p. 93):

> "But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute it."

The same principle was reaffirmed and applied in *United States* v. *Abilene & So. Ry.*, 265 U. S. 274, 286-289; *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292, 300-303. Obviously, when the Secretary's unilateral determination order, after a proceeding on which no record was kept, and based on evidence not disclosed to the contractor, is given the effect of a prima facie case in the Tax Court proceeding, the contractor does not know upon what evidence it was based and he has no opportunity to refute it. Plainly the "presumption of correctness" here applied is a specious evasion of the requirement of due process in the administrative determination by the Tax Court. The Secretary's order must be treated as a nullity in the Tax Court proceeding.

(5) Purpose of Congress to guard against the arbitrary action of the Tax Court here taken and to deprive the

Secretary's determination of any evidential value is also evidenced by the express provision in section 1191(c)(1):

> "Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination of the facts used as a basis therefor, and of its reasons for such determination. *Such statement shall not be used in the Tax Court of the United States as proof of the facts or conclusions stated therein.*" (Emphasis supplied.)

If the conclusions may not be used as proof thereof, then clearly the stated intent of Congress in section (e)(1) that the proceeding should not be a review must include purpose to prevent the formal order of determination from having the effect of evidence to make out a prima facie case.

Plainly, the attempt of the Tax Court to apply the rules of evidence ordinarily applied with respect to individual taxpayers is in conflict with the stated purpose of Congress to give the contractor a true *de novo* proceeding free of any arbitrary presumption of correctness that would unfairly thrust upon him the enormous burden of obtaining and establishing the pertinent data.

Although it is specifically inapplicable here because passed while the instant proceeding was pending in the Tax Court, it is pertinent to note that the Administrative Procedure Act states (section 7(c), 5 U.S.C., sec. 1006(c)):

> "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

2. Retroactive Application of the Renegotiation Act to Direct Contracts With the United States Violates the Due Process Clause of the Fifth Amendment

Petitioners entered into contracts with the United States as a result of competitive bidding at arms' length, prior to the passage of the Renegotiation Act (R. 42) and the sums sought to be recovered by the United States are part of the sums actually paid to, and accepted by petitioners, pursuant to these contracts (R. 42). There thus arose the question of the constitutional power of the United States retroactively to impair a contract directly with the United States.[6]

This Court expressly reserved decision on this point in *Lichter* v. *United States*, 334 U. S. 742. This case could have been decided exclusively upon the grounds that the

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[6] It is important to distinguish between a renegotiation prospectively applied and one retroactive in effect. Prospectively applied, the Act is clearly valid, since the parties might agree for payment of what shall be considered fair and reasonable by the Government contracting agent and this could be upset only if the contractor could show fraud. *United States* v. *Wunderlich*, 342 U. S. 98. In contrast, attempt retrospectively, as here, to impose on the fixed price contractor the burden of proving that the agreed price does not result in excessive profits ignores the strong presumption that a contract price based on competitive bidding with respect to a simple cantonment building contract involving known factors of cost, fixes a reasonable and non-excessive price in the first instance. This same distinction based on contract was noted at the time the provision for Tax Court review (sec. 403(e)(1)(2) was first added to the Renegotiation Act by the Revenue Act of 1943, Act February 25, 1944, c. 63, 58 Stat. 21, 78:

"The Tax Court was chosen to perform this function for four principal reasons. * * * the fourth is that a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits, for the committee is aware that the standards it has prescribed for the determination of excessive are too general and flexible to be applied judicially. Under the amendments recommended by the committee these standards do not have to be applied judicially since the obligation to refund excessive profits is made in all cases—as under the original Vinson-Trammell Act—a contract obligation of the contractor." (Mr. Disney of the House Committee on Ways and Means, 89 Cong. Rec. 9929).

administrative remedy had not been availed of, and even though the Court ruled on the constitutionality of the act as applied to sub-contracts it made it perfectly clear that it was not ruling upon the act as applied to contracts directly with the Government. Sustaining of the act under the circumstances of our case is in conflict with many cases decided by this Court including: *United States* v. *Central Pacific R.R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 66-67; *Lynch* v. *United* States, 292 U. S. 571; *Sinking Fund Cases*, 99 U. S. 700; *Chicago & N.W. Ry. Co.* v. *United States*, 104 U. S. 680; *Choate* v. *Trapp*, 224 U. S. 665; *Perry* v. *United States*, 294 U. S. 330.

CONCLUSION

This Court in *Lichter* v. *United States*, 334 U. S. 742 indicated its solicitude in guarding against abuses such as are involved here. It said (p. 754):

> "The very finality of the administrative determinations here upheld emphasize the seriousness of the injustices which can result from the abuse of the large powers vested in the administrative officials . . . We reemphasize that, under these conditions there is great need both for adequate channels of procedural due process and for careful conformity to these channels."

Here the petitioners have plainly been deprived of any real opportunity to be heard. The "burden of proof" rule as applied by the Tax Court in this case plainly violates the minimal requirements of due process and as well the command of the statute. Nevertheless counsel has been subjected to an obvious judicial whipsaw. As pointed out above (p. 12), the District of Columbia Court of Appeals in *Ring Construction Corporation* v. *Secretary of War*, 178 F. 2d 714, cert. den. 339 U. S. 943, held that it could not review questions of procedural due process arising in the procedure and determination of excessive profits by the Tax Court. Now, relying on that holding, counsel is

told by the Court of Appeals for the Eighth Circuit that the determination of the Tax Court is res judicata because he failed to seek in the District of Columbia Court of Appeals a review of what is there unreviewable.

It is submitted that the proper interpretation and administration of the Renegotiation Act, and justice to petitioners require that the case be brought here for review.

Respectfully,

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APPENDIX

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15,716

JOSEPH A. BASS, RAYMOND J. BASS and ANITA RUTH BASS, individually, and as co-partners, doing business under the name and style of JOSEPH A. BASS COMPANY; PAUL STEENBERG CONSTRUCTION COMPANY, a corporation; and FLEISHER ENGINEERING & CONSTRUCTION COMPANY, a corporation, *Appellants*,

v.

UNITED STATES OF AMERICA and KENNETH C. ROYALL, Secretary of the Army, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[April 26, 1955]

Before SANBORN, JOHNSEN and VOGEL, *Circuit Judges*.

SANBORN, Circuit Judge.

This is an appeal from a summary judgment for the United States in an action brought under Section 403(c) of the Renegotiation Act of 1942 as amended, 50 U. S. C. Appendix, § 1191, to recover from the defendants (appellants) amounts determined by the Under Secretary of War to be "excessive profits" realized from war contracts, less tax credits, plus six per cent interest on the amount of the net balance from August 30, 1944, the date of the Under Secretary's determination, to April 28, 1948.

To stop the running of interest on the Government's asserted claim, the defendants, during the pendency of the instant action, under a stipulation preserving their rights

to contest their liability, paid to the Government on April 28, 1948, the net principal amount of its claim.

The factual situation out of which this case arose is not in dispute and differed in no substantial respect from that involved in the case of *Ring Construction Corporation* v. *United States*, 8 Cir. 209 F. 2d 668, decided by this Court in January, 1954. The applicable law is no different. The pertinent provisions of the Renegotiation Act, as amended, are quoted on page 669 of 209 F. 2d in footnote 1, and we shall not requote them in this opinion. See also footnote 1 in *Lichter* v. *United States*, 334 U. S. 742, 745 and the appendix on pages 793-802 of 334 U. S.

The defendants had jointly entered into war contracts with the Government prior to April 28, 1942, but had not received final payment prior to that date. By the express terms of the Renegotiation Act, their contracts were subject to renegotiation. See *Lichter* v. *United States*, *supra*, pages 788-789 of 334 U. S., and *Ring Construction Corporation* v. *Secretary of War of United States*, D.C. Cir., 178 F. 2d 714, 715-716. The Under Secretary of War had on August 30, 1944, unilaterally determined the amount of excessive profits which the defendants had realized. The defendants petitioned the Tax Court, under § 402(e)(1) of the Act, for a redetermination of the amount of such profits. The Tax Court on May 22, 1953, 20 T.C. 428, sustained the determination made by the Under Secretary. The defendants did not petition under § 1141 of Title 26 U.S.C. for a review of the decision of the Tax Court. Section 1141 gives to the Courts of Appeals "exclusive jurisdiction to review the decisions of the Tax Court." This section, it has been held, authorizes a review by a Court of Appeals of renegotiation orders of the Tax Court, excepting as to questions relating to "the amount, if any, of excessive profits." *United States* v. *California Eastern Line, Inc.*, 348 U. S. 351. The time within which the defendants could petition for a review by a Court of Appeals of the Tax Court decision of which they complain has long since expired.

In view of the factual situation and the obvious finality and effect of the decision of the Tax Court, whether right or wrong, the District Court, in entering summary judgment, concluded that nothing remained to be decided except the rate of interest to which the Government was entitled for the period prior to April 28, 1948, the date the defendants paid the net principal amount of the Government's claim. The District Court allowed the Government interest at four per cent, instead of six per cent, from August 30, 1944, the date of the Under Secretary of War's determination, to April 28, 1948.

We think the District Court could not, under the circumstances, logically have done otherwise than grant the motion of the United States for a summary judgment. As the District Court ruled, the decision of the Tax Court in the redetermination proceeding initiated by the defendants in that court, which proceeding was between the same parties with respect to the same claim, was res judicata not only as to all questions presented to the Tax Court but as to all questions which could have been presented to that court. *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 623; *Guettel* v. *United States*, 8 Cir., 95 F. 2d 229, 230-231; *Pelham Hall Co.* v. *Hassett*, 1 Cir., 147 F. 2d 63, 66-67 and cases cited; *International Building Co.* v. *United States*, 8 Cir., 199 F. 2d 12, 18 (reversed on other grounds, 345 U. S. 502).

The Tax Court alone had jurisdiction to redetermine the amount of excessive profits realized by the defendants. *United States* v. *California Eastern Line, Inc., supra.* Any questions as to jurisdiction of the Under Secretary of War to determine excessive profits or of the Tax Court to decide the issues presented to it and any questions as to the constitutionality of the Renegotiation Act or the proceedings taken under it were subject to review under 26 U.S.C. § 1141. *United States* v. *California Eastern Line, Inc., supra.* Since we are convinced that the decision of the Tax Court could not be reviewed, re-opened or

collaterally attacked in the District Court and was res judicata as to the validity and amount of the Government's claim, there is no justification for stating the various contentions of the defendants relating to the alleged invalidity of the claim.

The defendant's assertion that interest should have been allowed only from the date of the Tax Court's decision is, in our opinion, not tenable. It was on August 30, 1944, that the amount of excessive profits was determined by the Under Secretary of War. That determination was not disturbed by the Tax Court. The determination was made under authority of law and, we think, was presumptively correct from its inception. Cf. *Welch* v. *Helvering*, 290 U. S. 111. Under the circumstances, the liability of the defendants accrued as of August 30, 1944, and interest ran from that date.

The judgment appealed from is affirmed.

APPENDIX B

The relevant portion of 26 U.S.C., section 1141, is as follows:

> § 1141. *Courts of Review*
>
> (a) The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code. As amended May 24, 1949, c. 139, § 128, 63 Stat. 107.

The relevant provisions of the Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, April 28, 1942, c. 247, 56 Stat. 226, 245, as amended by Revenue Act of 1943, Act February 29,

1944, c. 63, 58 Stat. 21, 78, 50 U.S.C. App. Sec. 1191) are as follows:

(e) Petition for redetermination; imitation; jurisdiction of the Tax Court; powers and duties of court; payment of fees and expenses; finality of determination

(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1) ((of this section)), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.
• • •

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall

have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

APPENDIX C

Rules of the Tax Court of the United States

Rule 32. Burden of Proof.—The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

* * * *

Rule 64. Renegotiation of Contracts Cases.—

I. Except as otherwise prescribed by this Rule, proceedings for the redetermination of excessive profits under the Renegotiation Acts shall be governed by the existing Rules of Practice before this Court. Where any of the existing Rules (except Rule 48) or the matter contained in the Appendix refer to the Commissioner, such Rules and the matter in the Appendix, when applied to a proceeding for the redetermination of excessive profits under the Renegotiation Acts, shall refer to the War Contracts Price Adjustment Board (or to the United States when substituted therefor), to the Secretary as defined and used in the Renegotiation Acts, or to the Renegotiation Board. Similarly, references to the taxpayer shall refer to the contractor or subcontractor; references to tax shall refer to profits under a contract or subcontract subject to renegotiation or to excessive profits thereunder, dependent upon context; and references to the determination of a deficiency, or a notice of such determination, shall refer to the order of the Board or the Secretary determining the amount of excessive profits.

II. A proceeding for the redetermination of excessive profits under the Renegotiation Acts shall be initiated by the filing of a petition, as provided in Rules 4, 6, and the pertinent parts of Rule 7 * * *.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	14
Appendix	15

CITATIONS

Cases:

Aircraft and Diesel v. *Hirsch*, 331 U. S. 752	10
Crane v. *Hahlo*, 258 U. S. 142	9
Robert I. Gale, Estate of, et al. v. *United States*, No. 11906, March 31, 1955	13
Knu-Vise, Inc. v. *War Contracts Price Adjustment Board*, 195 F. 2d 198	11, 12
Lawler v. *National Screen Service Corp.*, No 163, 1954 Term, decided June 6, 1955	8
Lichter, et al. v. *United States, et al.*, No. 11925, March 24, 1955	13
Lichter v. *United States*, 334 U.S. 841	14
Lincoln Electric Co. v. *Forrestal*, 334 U. S. 841	14
Lowell Wool By-Products Co. v. *War Contracts Price Adjustment Board*, 192 F.2d 405	12
Passavant v. *United States*, 148 U. S. 214	9
Ring Construction Corp. v. *Sec. of War*, 8 T. C. 1070, affirmed, 178 F. 2d 714, certiorari denied, 339 U. S. 943	5, 11, 13, 14
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	9
United States v. *California Eastern Line, Inc.*, 348 U. S. 351	8, 9, 10, 11, 12, 13
U. S. Electrical Motors, Inc. v. *Jones*, 153 F. 2d 134	10
United States v. *Ring Construction Corp.*, 113 F. Supp. 217, affirmed, 209 F. 2d 668	7
Welch v. *Helvering*, 290 U. S. 111	13
Williamsport Company v. *United States*, 277 U. S. 551	9

Statutes and Rule:

	Page
Internal Revenue Code of 1939, Sec. 1141, 26 U.S.C. (1952 ed.) 1141	10, 11, 12, 17
Revenue Act of 1943, Title VII:	
Renegotiation Act, 58 Stat. 21, 78:	
Sec. 403(c)	2
Sec. 403(e)	11, 15
Rule 32 Tax Court	13

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 124

JOSEPH A. BASS, RAYMOND J. BASS, AND ANITA RUTH BASS, Individually, and as Co-partners doing business under the name and style of JOSEPH A. BASS COMPANY; PAUL STEENBERG CONSTRUCTION COMPANY, a Corporation; and FLEISHER ENGINEERING AND CONSTRUCTION COMPANY, a Corporation, PETITIONERS

v.

UNITED STATES OF AMERICA and KENNETH C. ROYALL, Secretary of the Army

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 77-81) is reported at 129 F. Supp. 909. The opinion of the court of appeals (Pet. App. 1-4) is reported at 221 F. 2d 494.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1955 (R. 103). The petition for a writ of certiorari was filed on June 6, 1955. The jurisdiction of this Court is invoked under 28 U.S. C. 1254 (1).

QUESTION PRESENTED

Whether the district court and the court of appeals properly held that the unappealed decision of the Tax Court in a renegotiation redetermination proceeding was *res judicata* in a district court collection action by the government (to recover the excessive profits) upon all issues which were raised or which could have been raised in the Tax Court.

STATUTES INVOLVED

The relevant provisions of the Second Regenotiation Act, Title VII of the Revenue Act of 1943, 58 Stat. 21, 78; and Section 1141 of the former Internal Revenue Code, 26 U.S.C. (1952 ed.) 1141, are set forth in the Appendix, *infra,* pp. 15-18.

STATEMENT

This action was brought by the Government pursuant to Section 403(c) of the Renegotiation Act, as amended, to recover from Joseph A. Bass, et al., [1] petitioners here, the amounts determined by the Under Secretary of War, pursuant to the Act, to be excessive profits under certain contracts with the Government. On July 26, 1954, the United

[1] Joseph A. Bass, Raymond J. Bass, and Anita Ruth Bass, individually and as co-partners, d/b/a Joseph A. Bass Company, Paul Steenberg Construction Company, and Fleisher Engineering and Construction Company, were joint contractors and co-venturers in the contracts which were the subject of the renegotiation proceedings (R. 2).

States District Court for the District of Minnesota, Fourth Division, awarded summary judgment to the United States (R. 88). Since the Government had been paid the net principal of the claim pursuant to a stipulation entered into between the parties after the commencement of this action, the judgment of the district court was that the Government recover four percent interest on the principal amount from the date of the Under Secretary's determination to the date on which the principal had been paid to the Government (R. 2). On appeal by petitioners, the Court of Appeals for the Eighth Circuit affirmed (Pet. App. 4). The pertinent facts may be summarized as follows:

On August 30, 1944, the Under Secretary of War (to whom the Secretary of War had delegated his authority) issued unilateral orders determining that the petitioners had realized excessive profits in the amount of $465,000 during the calendar year 1942, from contracts involving construction at Camp Breckenridge, Kentucky; and in the amount of $170,000 during the contractors' fiscal period of January 1, 1943, through April 30, 1943, from contracts involving construction at Camp McCoy, Wisconsin (R. 6-11). The contractors thereupon petitioned the Tax Court of the United States, as permitted by Section 403(e) of the Renegotiation Act (*infra,* pp. 15-17), for a redetermination of the amount of excessive profits so determined (R. 12).

On October 21, 1947, while the Tax Court proceeding was still pending, the Government, as authorized by Section 403(c) of the Act, commenced

this action to recover the amounts determined to be excessive profits by the Under Secretary, less appropriate tax credits, plus six percent interest on the net balance from August 30, 1944, the date of the Under Secretary's determination (R. 1-5). On April 28, 1948, the parties stipulated that in order to stop the running of interest the contractors should pay the Government $288,623.62, the net balance owing the Government after the deduction of appropriate tax credits (R. 11-18). This payment of principal was made "under protest and with full reservation of such rights as they [the contractors] may have to recover the same" (R. 12). The stipulation further provided that the instant collection action should be stayed pending the final determination of excessive profits by the Tax Court and any appellate tribunal to which the Tax Court decision might be appealed (R. 13). Upon such final determination, the contractors were to have fifteen days within which to answer in the district court and raise any proper issues (R. 13).[2]

In order to expedite the Tax Court proceedings, the parties stipulated as to the facts before that court (R. 26). The case was then submitted to the Tax Court on the basis of the pleadings and the stipulation, without the introduction of evidence, each party contending that the other had the burden of establishing the extent to which the profits

[2] On April 28, 1948, pursuant to another stipulation between the parties, Josephine A. Bass, individually and as one of the co-partners doing business under the name of Joseph A. Bass Construction Co., was admitted as an additional party-defendant, and Paul Steenberg, as liquidating trustee of the Paul Steenberg Construction Co., was substituted as a party-defendant in place of the latter company (R. 18-19).

were or were not excessive (R. 72). Thereafter, the Tax Court, in an opinion promulgated May 22, 1953, sustained the Under Secretary's determination of excessive profits (R. 66-72). That court, after rejecting petitioners' arguments attacking the Secretary's authority to renegotiate these contracts and the manner in which they were renegotiated (R. 67-71), held, contrary to petitioners' contentions, that the Renegotiation Act as amended "is constitutional on its face and as applied in these proceedings" (R. 71-72).[3] The Tax Court also rejected petitioners' claim that the Secretary had the burden of proving that his determinations of excessive profits were correct (R. 72). The court held it to be well-established that the contractors, as the moving parties in that forum, had the burden of proving in a Tax Court proceeding that the Secretary's determination of excessive profits was erroneous (R. 72). Since the contractors had offered no evidence in discharge of that burden, the Tax Court accepted the Secretary's determinations (R. 72).[4] By order of June 3, 1953,

[3] These constitutional objections related principally to the retroactive application of the Act and the finality the Act attaches to Tax Court redeterminations (R. 71). All of the constitutional issues raised in these Tax Court proceedings had already been decided adversely to the contractors in *Ring Construction Corp.* v. *Sec. of War*, 8 T.C. 1070, affirmed, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U.S. 943. According to contractors' counsel they were raised again to preserve the questions for any possible further proceedings (R. 71-72).

[4] The parties had stipulated in the Tax Court that, if that court ruled against the contractors with respect to their contentions of law, the Tax Court's redetermination should be that excessive profits were realized in the amounts of $465,000 and $170,000.

the Tax Court entered its decision pursuant to its opinion of May 22, 1953 (R. 47). No appeal to a court of appeals was taken from that decision (R. 80).

Thereafter, under the stipulation of April 28, 1948, *supra,* p. 4, the Government filed a supplemental complaint in the present collection action (R. 31-39), in which it realleged the elements of its original complaint, and recited the receipt of the net principal amount claimed, and the redetermination of the Tax Court (R. 31-34). The supplemental complaint concluded that there remained due and owing to the United States interest at the rate of six percent per year on the sum of $288,623.62 from August 30, 1944, the date of the Under Secretary's determination (R. 33).

Petitioners then filed an amended answer, in which they alleged numerous errors of law and procedure underlying both the Under Secretary's original determination and the Tax Court's redetermination. Petitioners further denied the binding effect of the Tax Court's decision in this district court collection action (R. 40-48), for the reason, among others, that the Tax Court erred in placing the burden of proof on the issue of excessive profits upon the contractors (R. 45). The answer also asserted a number of constitutional infirmities in the Act, principally concerning its retroactive application and the statutory finality of Tax Court redeterminations (R. 45). In this connection, it was claimed that the Act denied any review of the Tax Court's decision by a federal court of appeals and that the contractors had a constitutional right to a full judicial hearing before a constitutional

court (R. 46). Therefore, the answer concluded, the district court should determine all of the issues of law and fact raised, require the Government to establish its cause of action *de novo,* and enter judgment for petitioners (R. 47-48).

The Government thereupon moved to strike the affirmative allegations contained in the amended answer and for summary judgment (R. 49). On April 9, 1954, the district court issued its memorandum decision granting the Government's motion for summary judgment (R. 77-81). The court stated that the constitutional questions which the contractors sought to raise could have been reviewed by the Court of Appeals for the District of Columbia Circuit on an appeal from the Tax Court's decision, in accordance with the long-established holdings of that circuit, and that the contractors therefore have not been denied judicial review of those questions (R. 80). Consequently, the court stated, the Tax Court's decision upon constitutional issues which were litigated or which could have been litigated was *res judicata* and not open to collateral attack in this proceeding (R. 80). The district court then held that the remaining questions of fact and law which were decided by the Tax Court were final and non-reviewable by virtue of Section 403(e) of the Renegotiation Act (R. 80-81).[5]

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[5] With regard to interest, the district court, referring to its earlier opinion in *United States* v. *Ring Construction Corp.*, 113 F. Supp. 217 (D. Minn.), affirmed, 209 F. 2d 668 (C.A. 8), concluded that four percent interest on the principal from August 30, 1944, to April 28, 1948, the date the principal was paid, would adequately compensate the Government (R. 81). The Government did not appeal that ruling.

On petitioners' appeal, the court of appeals affirmed (Pet. App. 1-4). It held that, in the circumstances of this case, the district court had no recourse other than to grant the Government's motion for summary judgment, since the decision of the Tax Court in the redetermination proceedings, which were between the same parties and with respect to the same claims, was *res judicata* as to all questions which were presented or which could have been presented to the Tax Court (Pet. App. 3). Citing *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351, the court held that the Tax Court alone had jurisdiction to redetermine the amount of excessive profits realized by petitioners and that any jurisdictional or constitutional questions there involved could have been reviewed by the court of appeals upon direct appeal under 26 U.S.C. 1141 (*infra*, pp. 17-18) (Pet. App. 3). The court, accordingly, concluded that the Tax Court's decision was *res judicata* as to the validity and amount of the Government's claim and could not be reviewed or collaterally attacked in this collection proceeding (Pet. App. 4).

ARGUMENT

1. Since the Tax Court redetermination proceedings involved the same parties and issues as were before the district court in this collection action, it would seem clear on familiar principles that the final decision of the Tax Court precluded relitigation of these issues in the present action. Cf. *Lawlor* v. *National Screen Service Corp.*, Oct. Term, 1954, No. 163, decided June 6, 1955, slip op., pp. 3-4. In opposition to this controlling principle, petitioners argued in both courts below that the

finality provision in Section 403(e) of the Renegotiation Act (*infra*, pp. 15-17) precluded review by a constitutional court of any of the issues raised in the Tax Court proceedings and therefore was unconstitutional. It follows, they contended, that the Tax Court's decision could not be *res judicata* in this collection action. In essence, this also is their position in this Court.

This Court's recent holding in *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351, however, demonstrates the unsoundness of that position. In *California Eastern*, the Court expressly ruled that, on the one hand, Tax Court determinations on issues relating to the amount of excessive profits are final and unreviewable by any court, and, on the other, that that court's rulings on other questions such as constitutional and jurisdictional issues are open to direct appellate review under former 26 U.S.C. 1141 (*infra*, pp. 17-18). 348 U.S. 354-355. If, as we believe is plain, petitioners err in their attack on the validity of the finality clause as construed in *California Eastern*,[6] that decision

[6] Petitioners' contention (Pet. 10-11) that this Court has never sustained a finality provision like that here involved is belied by the numerous decisions on this precise point. "Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved." *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303. And see, *e.g.*, *Williamsport Co.* v. *United States*, 277 U.S. 551; *Crane* v. *Hahlo*, 258 U.S. 142; *Passavant* v. *United States*, 148 U.S. 214. The basis for the constitutional validity of the Renegotiation Act's finality provision with respect to Tax Court determinations of the amount of excessive profits is particularly strong, considering the expertise of that body, its

makes clear that the only judicial remedy to which the contractor is entitled, after a Tax Court redetermination, is an appeal on jurisdictional and constitutional issues to the court of appeals.

The same route should have been followed if the finality clause is invalid, as petitioners urge. For if that were the case, former 26 U.S.C. 1141 would stand unimpaired as a grant of full jurisdiction to the court of appeals to review Tax Court renegotiation decisions in the same manner as district court judgments and Tax Court tax rulings. See *United States* v. *California Eastern Line*, 348 U.S. 351, 353-4.[7] Petitioners could then have presented to the appellate court all the challenges to the Tax Court decision they now seek to raise in this collection action.

2. Similarly, there is no merit to petitioners' secondary argument with respect to the Tax Court's placing on them of the burden of proof. They contend that since the District of Columbia Circuit has refused to review questions involving this Tax Court procedure, that issue was not reviewable in a direct appeal from the Tax Court and accordingly could be reopened collaterally in this collection action (Pet. 11-13).

"essentially judicial procedures and experience" (*Aircraft and Diesel* v. *Hirsch*, 331 U.S. 752, 769), and the reviewability under former 26 U.S.C. 1141 of other issues, such as constitutional and jurisdictional questions.

[7] Petitioners would not, of course, be excused from urging upon the court of appeals the invalidity of the finality clause by the consistent practice in the District of Columbia Circuit of treating the clause, properly read, as valid. *E.g.*, *U.S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134. If necessary, review could have been sought in this Court.

The District of Columbia Circuit has refused to review this question because that court was of the view that it was an integral part of the redetermination of excess profits and therefore non-reviewable under the express provisions of Section 403(e) of the Act (*infra*, pp. 15-17). See *Ring Construction Corp.* v. *Sec. of War*, 178 F. 2d 714, 715 (C.A.D.C.), certiorari denied, 339 U.S. 943. If this ruling is wrong and the issue is, as petitioners contend, either jurisdictional, involving an erroneous construction of Section 403(e) of the Act, or constitutional, a deprivation of procedural due process,[8] the consequences of failure to seek correction by direct appeal under former 26 U.S.C. 1141 are in no way altered. For, in these circumstances the way was open to petitioners, as it was to the Government in *California Eastern*, to seek direct appellate review and, if the court of appeals held the question non-reviewable, to petition this Court for certiorari. Therefore, even if petitioners were correct in claiming that the Tax Court's allocation of the burden of proof is reviewable on direct appeal, their failure to seek such review precludes them from reopening the issue collaterally in this collection suit.

3. Petitioners may also be urging (Pet. 9-10) that *California Eastern* should be construed as deciding that appellate review of Tax Court decisions is permissible only where the Tax Court has dis-

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[8] Contrary to petitioners' contention (Pet. 22), the District of Columbia Circuit will review questions of procedural due process upon an appeal from a Tax Court determination under 26 U.S.C. 1141. *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198 (C.A. D.C.).

posed of the case on some preliminary jurisdictional or constitutional issue but has made no determination of excessive profits. Based on this reading, they appear to contend that where, as here, the Tax Court has redetermined the amount of excessive profits as well as passed on other issues, no part of its decision is subject to direct appellate review under former 26 U.S.C. 1141, even its rulings on constitutional and jurisdictional matters. Therefore, according to petitioners, the Act as construed by this Court still contains a constitutional infirmity and the Tax Court's rulings are not binding in the Government's suit to collect the excessive profits.

Although *California Eastern*, as it came to this Court, involved only a preliminary jurisdictional issue, it is clear from the opinion that the holding was not restricted to this particular factual situation. Thus, the Court expressly stated that the reconciliation between 26 U.S.C. 1141 and the Renegotiation Act adopted by the District of Columbia Circuit "has a permissible basis, and accordingly we see no reason to upset the review practice that has grown up under it." 348 U.S. at 354. And, under the review practice thus approved, the District of Columbia Circuit has consistently reviewed issues other than those relating to the "amount" of excessive profits even though it would not pass upon those "amount" issues themselves in cases where the Tax Court has passed on all issues raised. See, *e.g.*, *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405 (C.A. D.C.); *Knu Vise, Inc.* v. *War Contracts*

Price Adjustment, 195 F. 2d 198 (C.A. D.C.), cited by this Court in *California Eastern, supra* at 354, fn. 5. In each of those cases, the District of Columbia Circuit had reviewed non-"amount" issues notwithstanding the fact that the Tax Court's order under review simultaneously determined the amount of excessive profits. Since this happened in *Ring Construction Corp.* v. *Sec. of War,* 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U. S. 943, also handled by counsel for petitioners (Pet. 12), this "review practice" of the District of Columbia Circuit, now approved by this Court, can scarcely come as a surprise.[9] Thus, it is plain that *California Eastern* cannot be read in the narrow fashion petitioners seem to suggest.

4. It remains only to note, by way of parenthesis, the lack of merit in petitioner's two attacks on the Tax Court's decision in this case. On the issue of burden of proof, the Tax Court has consistently and properly applied to renegotiation cases the same general rule it follows, with the support of this Court, in tax matters, *i.e.*, that the burden is on the moving party in that court. See Tax Court Rule 32; *Welch* v. *Helvering,* 290 U. S. 111, 115. The other issue which petitioners seek to reopen, the constitutionality of the retroactive

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[9] Moreover, since the *California Eastern* decision, the District of Columbia Circuit has on at least two occasions reviewed Tax Court decisions on questions other than determinations of amount, notwithstanding the fact that the Tax Court had also made a determination of the amount of excessive profits. *Estate of Robert I. Gale, et al* v. *United States,* C.A. D.C. No. 11906 (decided March 31, 1955); *Lichter, et al.* v. *United States, et al.,* C.A. D.C. No. 11925 (decided March 24, 1955).

application of the Act to contracts between the Government and prime war contractors, has already been disposed of in the Government's favor. See *Lichter* v. *United States*, 334 U. S. 742; *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841; *Ring Construction Corp.* v. *Sec. of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U. S. 943.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1955.

APPENDIX

1. Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78, 86) provides as follows in pertinent part:

Section 403 * * *

(e)(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and

the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The

Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

2. Section 1141(a) of the former Internal Revenue Code, 26 U.S.C. (1952 ed.) 1141, is as follows:

Section 1141. *Courts of Review*

(a) *Jurisdiction.* The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil

actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

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INDEX

	Page
1. The Government brief misapprehends and misstates petitioners' contentions	3
2. The Government's argument rests in large part upon unwarranted extensions of the decision of this Court	6
3. Weighed against petitioners' actual contentions and the actual decision in the *California Eastern Line* case, the Government's brief is without substance	7
Government's First Point	7
Government's Second Point	10
Government's Third Point	12
Government's Fourth Point	15
Conclusion	18

CITATIONS

CASES:

Armour & Co v. Wantock, 323 U. S. 126	6
Bell Tel. Co. v. Comm'n, 301 U.S. 292	18
Blair v. Oesterlein Machine Co., 275 U. S. 220	17
Blair v. Oesterlein Machine Co., 17 F. 2d 663	17
Crane v. Hahlo, 258 U. S. 142	9
Ebco Manufacturing Co. v. Secretary of Commerce, 221 F. 2d 902	14
Estep v. United States, 327 U. S. 114	10
French v. War Contracts Price Adjustment Board, 182 F. 2d 560	3
Greaves v. War Contracts Price Adjustment Board, 10 T. C. 886	17
Hughes v. Superior Court of California, 339 U. S. 460	6
Ng Fung Ho v. White, 259 U. S. 276	10
Reetz v. Michigan, 188 U. S. 505	10

Page

Ring Construction Corp. v. Secretary of War, 178 F. 2d 714, cert. denied 339 U. S. 943 ..5, 6, 11, 12, 14
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 10
Stein Brothers Mfg. Co. v. Secretary of War, 7 T. C. 863 16
Switchmen's Union v. National Mediation Board, 320 U. S. 297 9
United States v. California Eastern Line, Inc., 348 U. S. 351 .....3, 6, 7, 8, 12, 13, 14
United States v. Martin Wunderlich Co., 211 F. 2d 433 14
Williamsport Co. v. United States, 277 U. S. 551 ... 10

STATUTES AND HEARINGS:

Hearings before the Committee on Naval Affairs, 78th Cong., 1st sess., pursuant to H. Res. 30, June 10-30, 1943, vol. 2:

pp. 970-971 15
p. 1257 16

Internal Revenue Code (1939) sec. 1141, 26 U. S. C. (1940 ed.) sec. 1141 .....2, 5, 6, 8, 9, 12, 13, 14

Renegotiation Act of 1943:

Sec. 403(c)(1), 50 U. S. C. App., sec. 1191(c)(1) 18
Sec. 403(e), 50 U. S. C. App., sec. 1191(e) 2, 3, 4, 7, 8, 12, 13

IN THE

Supreme Court of the United States

Ocober Term, 1955

No. 124

JOSEPH A. BASS, RAYMOND J. BASS, and ANITA RUTH BASS, individually and as co-partners doing business under the name and style of Joseph A. Bass Company; Paul Steenberg Construction Company, a corporation; and Fleisher Engineering and Construction Company, a corporation,
Petitioners,

v.

UNITED STATES OF AMERICA and KENNETH C. ROYALL,
Secretary of the Army.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

Under the decision of this Court in *United States* v. *California Eastern Lines, Inc.*, 348 U.S. 351, the appellate jurisdiction of the District of Columbia Court of

Appeals to review renegotiation decisions of the Tax Court under 26 U.S.C. § 1141, is subject to two limitations:

1. The appellate review is restricted to constitutional and jurisdictional issues.

2. The appellate jurisdiction may not be exercised, even as to constitutional issues where the amount of excessive profits has been determined. In any event, it may not be exercised as to a question of law incidental to the process of, and not separable from, the determination of the amount of excessive profits.

Section 403(e) of the Renegotiation Act validly precludes appellate review in the Court of Appeals under 26 U.S.C. § 1141 of the issues now raised in the collection suit in the district court:

(1) Whether the Renegotiation Act, applied retroactively to prime contracts, violates the due process clause of the Fifth Amendment:

(2) Whether the decision of the Tax Court, in determining the amount of excessive profits, deprived petitioners of property without due process, in violation of the Fifth Amendment, by casting on them the burden of proving the Secretary of War's determination wrong even though no opportunity was at any time afforded for them to know the evidence as to performance of other companies upon which the Secretary's determination was based.

Because the finality provisions of § 403(e) thus precluded appellate review, those issues decided by the Tax Court did not become res judicata for failure to seek the statutory appellate review (Petition, pp. 11-12). Finally, petitioners urge that in view of the

constitutional protections, the finality provision of § 403(e) will not be held to bar judicial review by the district court in the collection suit of the questions of law decided by the Tax Court in determining the amount of excessive profits (Petition, pp. 10-11). The distinction between statutory appellate review and judicial review was pointed out in *French* v. *War Contracts Price Adjustment Board,* 182 F. 2d 560, 565 (9th Cir., 1950).

The petition for certiorari rests upon these propositions and their erroneous disregard by the Court of Appeals for the Eighth Circuit. Shorn of misrepresentations as to petitioners' contentions and unwarranted extensions of the decision in *United States* v. *California Eastern Line, Inc.,* 348 U.S. 351, the Government's Brief in Opposition serves only to fortify the Petition for Certiorari.

1. The Government brief misapprehends and misstates petitioners' contentions.

The Government (Brief, Point I, pp. 8-10) refuses to recognize, and disregards, the distinction between statutory right to appellate review, which is a matter of legislative grace, and the right to judicial review which is a matter of constitutional right. This in turn underlies its contentions as to the effect of the decision of this Court in *United States* v. *California Eastern Line, Inc.,* 348 U.S. 351.

It is the petitioners' position that, as interpreted by this Court in the *California Eastern* case, § 403(e) is valid insofar as it narrows judicial review by exercise of appellate jurisdiction under 26 U.S.C. § 1141 so as to exclude appellate review of any order that is a determination of "the amount, if any, of excessive

profits". Petitioners have never contended that § 403 (e) is invalid in that aspect. But § 403(e) is invalid when applied, as here, to bar entirely from judicial review in other courts, such as the district court in this collection suit, questions of law, constitutional or otherwise, arising in the Tax Court's determination of the amount of excessive profits.

The Government clearly misapprehends or misstates our position in the following instances:

(a) Government Brief, pp. 9-10:

> "In opposition to this controlling principle, petitioners argued in both courts below that the finality provision in Section 403(e) of the Renegotiation Act (infra, pp. 15-17) precluded review by a constitutional court of any of the issues raised in the Tax Court proceedings and therefore was unconstitutional."

Petitioners have accepted the power of Congress to take away appellate review and do not attack the constitutionality of Section 403(e) insofar as it withdraws from the District of Columbia Court of Appeals *appellate* jurisdiction to review the Tax Court. Attack on the section 403(e) finality clause is restricted to its application to prevent judicial review in the collection suit of questions of law arising in the determination of amount of excessive profits by the Tax Court.

(b) Government Brief, p. 11: The Government urges that petitioners should have sought direct appellate review of the burden of proof question and, if the Court of Appeals again held it non-reviewable by appeal, sought certiorari. From this the Government concludes (Government Brief, p. 11):

> Therefore, even if petitioners were correct in claiming that the Tax Court's allocation of the burden of proof is reviewable on direct appeal, their failure to seek such review precludes them from reopening the issue collaterally in this collection suit.

This conclusion is obviously based on the reiterated erroneous premise, pointed out above, that petitioners are claiming the Tax Court's allocation of the burden of proof is reviewable on direct appeal under 26 U.S.C. § 1141[1]. On the contrary, petitioners have in this case, throughout accepted the express ruling of the Court of Appeals in the *Ring* case that the issue as to allocation of burden of proof by the Tax Court is not reviewable on appeal under 26 U.S.C. § 1141.[2] It is to be

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[1] This misconception of the Government obviously flows from the same inability to recognize the distinction between validity of the finality provision of section 403(e) to bar appellate review and its invalidity to bar judicial review in the collection suit in the district court.

[2] It will be recalled that in *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, 715, cert. denied 339 U.S. 943, the court held (p. 715):

"Ring Construction Corporation charges various errors were committed by the Tax Court in its determination of factual questions and in its ruling as to the burden of proof. * * *

"The questions raised by the petitioner, other than the constitutionality of the statute when retroactively applied, are not open to review by this court. * * *

"With respect to this unequivocal language [of § 403(e)] we said in U. S. Electrical Motors, Inc., v. Jones, 1946, 80 U. S. App. D.C. 329, 331, 153 F. 2d 134, 136: '* * * We think * * * the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination * * *'

"We do not stop, therefore, to state or examine the faults found by the petitioner with the procedure and determination of the Tax Court * * *".

noted that the Government does not concede that the decision in the *Ring Construction Corporation* case was wrong in refusing, relying on § 403(e), to exercise appellate jurisdiction to review the burden of proof question. Petitioners do not question it. Accepting it, they assert merely that section 403(e) is not valid when invoked to bar review of the burden of proof question in the district court collection suit.

2. The Government's argument rests in large part upon unwarranted extensions of the decision of this Court.

Mere reading of the decision in *United States* v. *California Eastern Line,* 348 U.S. 351, discloses the lack of warrant for the Government's assertions as to what was decided in that case. This Court held that appellate jurisdiction of the Court of Appeals of the District of Columbia under 26 U.S.C. § 1141 had not been so far restricted by the finality provisions of section 403(e) as to bar appellate review of the Tax Court's decision that a Red Sea voyage contract with the British Ministry of Transport was not renegotiable within the coverage of the Renegotiation Act. It dealt only with the question whether the appellate jurisdiction under 26 U.S.C. sec. 1141 as "narrowed" by section 403(e) of the Renegotiation Act embraced that particular issue. Since no other issues were involved, there was no occasion to rule on the effect of section 403(e) on the appellate jurisdiction of that court with respect to other issues. Neither was there occasion to rule on the effect of section 403(e) on the jurisdiction of other courts with respect to any issue. This Court did not do so. This Court has repeatedly warned that opinions must be read in the light of the facts and issues of the case under discussion. *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133; *Hughes* v. *Su-*

perior Court of California, 339 U.S. 460, 465. But even when given their fullest sweep, the statements of this Court in the *California Eastern* case fall short of supporting the Government's assertions as to the law there enunciated.

Manifestly, the Government's arguments against granting of the writ must be evaluated having due regard for error in the premises upon which it proceeds.

3. Weighed against petitioners' actual contentions and the actual decision in the California Eastern Line case, the Government's brief is without substance.

Government's First Point (pp. 8-10).—The Tax Court redetermination of the issues does not preclude judicial review of questions of law in the district court collection suit and its decision did not become final for failure to seek non-existent appellate review of the issues here involved.

As pointed out above, petitioners contend that the finality provision of section 403(e) precludes appellate review but cannot constitutionally take away judicial review of the issues here presented.

The Government asserts (p. 9):

> "The court's recent holding in *United States* v. *California Eastern Line* * * * however, demonstrates the unsoundness of that position. In *California Eastern* the Court expressly ruled that, on the one hand, Tax Court determinations on issues relating to excessive profits are final and unreviewable by any court * * *"

Of course, this Court did not so hold. It held (*United States* v. *California Eastern Line, Inc.*, 348 U.S. 351, 354):

> "* * * the particular order here is reviewable under § 1141 unless it is a determination of 'the

> amount, if any, of excessive profits' within the meaning of § 403(e)(1) of the Act."

Plainly the Court dealt only with the scope of appellate review of the issue of non-renegotiability. And it neither decided nor said anything as to non-reviewability of other issues in any other court in the exercise of original jurisdiction. The same unwarranted extension of the holding in *California Eastern Line* case appears on the same page 9 of the Government's brief:

> "If, as we believe is plain, petitioners err in their attack on the validity of the finality clause as construed in *California Eastern,* that decision makes clear that the only judicial remedy to which the contractor is entitled, after a Tax Court redetermination, is an appeal on jurisdictional and constitutional issues to the court of appeals."

This Court did not treat of the appellate jurisdiction as being the "only judicial remedy". It had no such issue before it, since it was dealing only with the issue of scope of appellate review under 26 U.S.C. § 1141 as narrowed by section 403(e) of the Renegotiation Act.

Finally, the Government misses the point entirely when it says (p. 10):

> "The same route should have been followed if the finality clause is invalid, as petitioners urge. For if that were the case, former 26 U.S.C. 1141 would stand unimpaired as a grant of full jurisdiction to the court of appeals to review Tax Court renegotiation decisions in the same manner as district court judgments and Tax Court rulings."

Plainly essential to the conclusion in this specious reasoning is the misrepresentation that petitioners urge the finality clause of section 403(e) to be invalid in its restrictive effect on appellate jurisdiction. But, as already shown, the finality clause is recognized by petitioners to be valid in its narrowing effect on the appellate jurisdiction of the court of appeals under 26 U.S.C. § 1141 as stated by this Court in the *California Eastern* decision. Petitioners' assertion of invalidity of section 403(e) when applied to impair the original jurisdiction of the district court clearly did not require them to invoke what was recognized to be a nonexistent appellate jurisdiction of the court of appeals. Obviously that court was not the place to urge that section 403(e) is unconstitutional if applied to bar judicial review by the district court of the questions of law integral with the determinations of amount of excessive profits by the Tax Court.

In our petition for certiorari, we said (p. 10, bot.)

> "We respectfully suggest that this Court has never sustained a finality provision like the one here involved and under circumstances such as obtain in this case, and that the Circuit Court of Appeals erred in doing so."

The Government cites a number of cases as holding to the contrary, (Gov't. Br., p. 9, note 6). But they do not parallel the circumstances or the questions here involved. In *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 303, the Court dealt with a "right" created by Congress, in effect holding that statutory provisions as to its enforcement measured the right. In *Crane* v. *Hahlo,* 258 U.S. 142, approving non-judicial determination of eminent domain dam-

ages, this court said (p. 147): "* * * when opportunity to be heard is given it satisfies the requirements of due process of law, especially when, as in this case, a right of review in the courts is given". In *Williamsport Co.* v. *United States,* 277 U.S. 551, this Court merely held the Court of Claims without jurisdiction to review the determinations of the Commissioner of Internal Revenue under the special assessment provisions of secs. 327 and 328 of the Revenue Act of 1918. No question of fair hearing or judicial review of questions of law was involved. In *Passavant* v. *United States,* 148 U.S. 214, a mere fact determination, reappraisal of value in the manner provided by law, by the board of general appraisers after full notice and opportunity for hearing, the provisions of the law itself being unchallenged, was held not subject to judicial review.

Due process does not necessarily require judicial process. (*Reetz* v. *Michigan,* 188 U.S. 505, 507) and the constitutional right to judicial review of findings of fact may extend only to civil liberties or personal freedom. *Ng Fung Ho* v. *White,* 259 U.S. 276; *Estep* v. *United States,* 327 U.S. 114, 120. Even property, however, has a certain minimum protection as Mr. Justice Brandeis pointed out in his concurring opinion in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly".

Government's Second Point (*Brief, pp. 10-11*).— The Government's misrepresentation of petitioners' position as to review of the burden-of-proof issue is

strikingly shown by its own self-contradiction as to petitioners' contention at the bottoms of opposing pages 10 and 11 of the Government brief:

(p. 10)

"They contend that since the District of Columbia Circuit has refused to review questions involving this Tax Court procedure, that issue *was not reviewable in a direct appeal* from the Tax Court and accordingly could be reopened collaterally in this collection action.

(p. 11)

Therefore, even if petitioners were correct in claiming that the Tax Court's allocation of the burden of proof *is reviewable on direct appeal*, their failure to seek such review precludes them from reopening the issue collaterally in this collection suit.

(Emphasis supplied)

If it were the function of the Government's brief to confuse rather than to aid, better means could scarcely be found.

The Government concedes (Brief, p. 11)—

> "The District of Columbia Circuit has refused to review this question because that court was of the view that it was an integral part of the redetermination of excess profits and therefore nonreviewable under the express provisions of section 403(e) of the Act".[3]

It is significant that the Government does not urge that the decision of the Court of Appeals in *Ring Construction Corp.* v. *Sec. of War*, 178 F. 2d 714, 715 (C.A.

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[3] The Government's argument proceeds: "If this ruling is wrong * * * ", petitioners in the instant case should have sought appellate review and, if necessary, certiorari to correct it. It concludes that, for failure so to proceed, petitioners are now barred from urging that the burden-of-proof question is reviewable on direct appeal.

Thus, although it initially correctly states petitioners' contention to be that the question was *not* reviewable on direct appeal, the Government's elaborate argument is carefully directed to establishing the conclusion that petitioners cannot now urge that the question is reviewable on direct appeal. We have never sought to do so.

D.C.), cert. denied 339 U.S. 943 was erroneous in holding the burden of proof question not subject to review. Even more important, however, is the failure of the Government to discuss petitioners' rights if the *Ring* decision was correct. The whole argument (Brief, p. 11) is based on the hypothesis: "If this ruling is wrong * * *".[4]

Addressed solely to an hypothesis of error in the Court of Appeals—error which neither party is asserting—the argument inferentially recognizes by its silence as to the alternative that the *Ring* decision is right, that the issue as to burden-of-proof allocation was not reviewable on appeal. It necessarily follows that it was not, in the district court collection suit, res judicata for failure to invoke that non-existent appellate jurisdiction.

Government's Third Point (*Brief, pp. 11-13*). Having regard for the issue presented on the record, the *California Eastern Line* decision holds only that despite the narrowing effect of section 403(e) appellate review under 26 U.S.C. § 1141 is permissible where the Tax Court has disposed of the case on some preliminary jurisdictional or constitutional issue but has made no determination of excessive profits. So far as that decision is concerned then, the finality provision of section 403(e) as there construed continues to make non-reviewable by appeal in this case the rulings of the Tax Court on both issues that petitioners sought to have reviewed in the district court collection suit:

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[4] Of course, this studied equivocation may forefend against necessity at some future day for another soul-searching reversal of position by the Government as in its brief on the merits in the *California Eastern* case.

1. Constitutionality of the Renegotiation Act when given retroactive effect as to prime contracts.
2. Constitutionality of the Tax Court rule imposing the burden of proof on petitioners in a *de novo* renegotiation proceeding to redetermine the amount of excessive profits.

In any event, the second issue was not res judicata for failure to pursue statutory appeal, even if the broadest effect be given to this Court's decision in the *California Eastern* case. For that opinion emphasizes that even a jurisdictional or constitutional issue, to escape the excluding effect of §403(e) and be reviewable by appeal under 26 U.S.C. § 1141, must be separable and not one arising in the very process of determination of the amount of excessive profits. This court pointed out in *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351, 354-355:

> "In making determinations as to excess profits the Tax Court must decide at least two *separate* but interrelated questions: (1) whether a renegotiable contract is involved and (2) the amount if any of excessive profits.
>
> * * * * * * * *
>
> We agree that a § 1141 Court of Appeals review should not upset such determinations. But we do not agree that the Tax Court's determination here is in that category. The question of the amount of profits was not even reached by the Tax Court."

Thus, given its broadest effect, the decision of this Court must be regarded, not as approving, but as disapproving appellate review of the question of constitutionality of the burden of proof rule of the Tax Court where it was decided by the Tax Court as an

incident to the process of, and constitutes an integral part of, the determination of the amount of excessive profits. *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, 436 (U.S. App. D.C., 1954). The *California Eastern* decision of this Court has recently been so construed by the Sixth Circuit. *Ebco Manufacturing Co.* v. *Secretary of Commerce*, 221 F. 2d 902, 904 (6th Cir., 1955).

Indeed, the Government brief cites the decision in *Ring Construction Corp.* v. *Sec. of War*, 178 F. 2d 714 (Brief, pp. 12-13) as being part of the "review practice" assertedly approved by this Court in the *California Eastern* case (Gov't. Br. pp. 12-13). If such broad effect is properly to be attached to this Court's decision, then it is clear that 26 U.S.C. § 1141 did not permit of appellate review of the burden of proof question. For in the *Ring* case, the District of Columbia Court of Appeals, as pointed out above, expressly held (178 F. 2d 714, 715):

> "Ring Construction Corporation charges various errors were committed by the Tax Court in its determination of factual questions and in its ruling as to the burden of proof. * * * The questions raised by the petitioner, other than the constitutionality of the statute when retroactively applied, are not open to review by this court."

Thus, according to the Government's own construction of the *California Eastern* case, the burden of proof issue was not within the approved "review practice" reviewable by appeal.

Obviously, the failure to seek non-existent appellate review could not render the issue as to allocation of burden of proof res judicata in the district court collection suit.

Government's Fourth Point (*Br., p. 13*).—The Government does not attempt to show that petitioners obtained a fair hearing in the Tax Court under the burden of proof rule there applied. It has not purported to answer the point but merely says the Tax Court has consistently applied to the renegotiation cases its general rule in Tax cases. Consistency cannot justify error.

Non-availability of the evidence upon which the determination of the Secretary of War was based is clear. In Hearings before the Committee on Naval Affairs, 78th Cong., 1st sess., pursuant to H. Res. 30, June 10-30, 1943, vol. 2, the Chairman of the War Department Price Adjustment Board testified (pp. 970-971):

> "Mr. Maas. Commander, do you give the facts of competitive concerns or concerns in the similar status to the contractors while you are renegotiating?
>
> "Mr. Karker. No, sir.
>
> * * * * * * * *
>
> "Mr. Maas. But why shouldn't you, as a matter of fact, make that information available?
>
> "Mr. Karker. We have gone on this basis up to now; that it is unfair to judge a particular situation on the basis of less than all the facts, and it is impossible to give all of the facts in relation to any company that has been renegotiated; and, secondly, that making public even a portion of the result, even that part of the profit which has been recovered, or the margin of profit allowed, would give an unfair and unjustified advantage to his competitors. * * *"

In a memorandum "Objections to Renegotiation and Answers Thereto (Prepared for the House of Repre-

sentatives Naval Affairs Investigating Committee by the War Department Price Adjustment Board)" (Hearings before the Committee on Naval Affairs, supra) the following statement is made (Hearings before the Committee on Naval Affairs, supra, vol. 2, p. 1257):

"SECRECY

"*Objection 28.*—The Departments should not surround their settlements with secrecy. Any handling of public funds should be a matter of public record, and contractors should have the benefit of knowing comparative costs and profits in their industry.

"*Response.*—The Boards do not reveal results of renegotiation because—

(a) It is impossible to reveal *all* facts and weightings leading to a determination.

(b) Such action might give aid, comfort, and advantage to competitiors. * * *"

In *Stein Brothers Mfg. Co.* v. *Secretary of War*, 7 T.C. 863, the court said (p. 888):

"The record does not afford an adequate factual basis for comparing this petitioner with others on capital, sales, and profits in peace and war, and on excessive profits. We express no opinion on whether or not and to what extent such information would be helpful or admissible here. However, it is possible that such comparable data and other information not in the present record may have been available and considered in the renegotiation of this case."

It thus appears that the use of subpoena to obtain the evidence on which the Secretary based his determination, as in *Blair* v. *Oesterlein Machine Co.*, 275

U.S. 220, was not physically possible. We have not discovered any renegotiation case in which the contractor sought or obtained the data on which the Secretary purported to act. Yet, as pointed out in *Blair* v. *Oesterlein Machine Co.*, 17 F. 2d 663, 666 (App. D.C. 1926) its absence in practical effect nullifies the statutory review in the Tax Court.

That the Tax Court rule is applied as a true burden-of-proof rule is demonstrated in *Greaves* v. *War Contracts Price Adjustment Board*, 10 T.C. 886, 889:

> "Petitioners' second contention is that the profits earned from renegotiable business during the year 1943 were entirely reasonable and not excessive, even though no salary allowance is made for their services. They urge that the only evidence contained in the record on this point is that produced by them, and that the inference to be drawn from the failure of the respondent to produce evidence is that no evidence could have been obtained which indicated that petitioners' earnings were excessive. Even if it were true that the respondent failed to produce any evidence to prove that petitioners' profits were excessive, we would not be justified in making the inference suggested by petitioners. They have the burden of proving that the respondent's determination that the profits were excessive is erroneous (Nathan Cohen v. Secretary of War, 7 T.C. 1002, 1011), and in order to prevail they must sustain this burden, regardless of whether the respondent produced any evidence".

The Tax Court thus gives full effect to a Secretary's decision that may have been purely arbitrary.

Here, neither the petitioners nor the Government put in any evidence as to amount of excessive profits. As pointed out in the Petition for Certiorari, the Renego-

tiation Act, section 403(c)(1), 50 U.S.C. App. sec. 1191(c)(1) specifically provides that the statement of the determination, of the facts used as a basis therefor, and of the reasons for such determination required to be furnished the contractor "shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein". Yet, applying its rule as to burden of proof, Tax Court takes the word of the Secretary "as to the outcome of a secret investigation and let's it go at that". Cf. *Bell Tel. Co.* v. *Comm'n.*, 301 U.S. 292, 304. The *Greaves* decision exhibits in full flower the vice of the burden-of-proof rule applied to renegotiation cases by the Tax Court.

Conclusion

It is respectfully submitted that writ of certiorari should be granted for the reasons stated in the petition.

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